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Proc. I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20549**

FILE: B-190615

DATE: March 8, 1978

MATTER OF: K & S Associates, Inc.

DIGEST:

1. Protest to GAO against requirement in IFB to submit list of subcontractors with bid and ambiguity in IFB filed after bid opening is untimely filed and not for consideration on the merits pursuant to 4 C.F.R. 20.2(b)(1) (1977), which requires filing of protests against alleged improprieties apparent in IFB before bid opening.
2. Where IFB contains subcontractor listing requirement, low bid which did not include list of subcontractors was nonresponsive as it afforded bidder opportunity to select, notwithstanding initial bid formulation, whichever subcontractor it desired contrary to requirement to preclude bid shopping.

K & S Associates, Inc. (K & S), protests the rejection of its bid under invitation for bids (IFB) No. MO06192F-RMO-73420 as nonresponsive to the subcontractors listing and affirmative action requirements. The IFB was issued by the General Services Administration (GSA) for miscellaneous construction work at the Federal Center, St. Louis, Missouri. Notwithstanding this protest, a contract (No. GS-06B-73420) has been awarded to Albers Construction Company (Albers), since GSA, in accordance with Federal Procurement Regulations § 1-2.407-8(b)(4) (1964 ed. amend. 68), determined that a prompt award would be advantageous to the Government.

The IFB required that the bidder submit as a supplement to Standard Form 21 a "list of subcontractors." The subcontractor listing requirements are contained in paragraph 10 of the Special Conditions of the IFB, which provides in pertinent part:

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"10.4 The list may be submitted with the bid or separately by telegraph, mail, or otherwise. If mailed separately, the envelope must be sealed, identified as to content, and addressed in the same manner as prescribed for submission of bids. Failure to submit the list by the time set for bid opening shall cause the bid to be considered nonresponsive * * *."

Additionally, each bidder was required to submit Standard Form 21 - Appendix A (Appendix A) setting forth the bidder's minority manpower utilization goals.

The contracting officer determined that K & S's bid was nonresponsive to the IFB because it did not include the required list of subcontractors. GSA did receive K & S's list of subcontractors on November 1, 1977, 5 days after bid opening. Subsequently, GSA reported that K & S's bid was also nonresponsive because Appendix A did not include the required minority manpower utilization goals.

K & S's position is that it was impossible to submit a list of subcontractors prior to bid opening with K & S located in St. Louis and bid opening in Kansas City since K & S did not receive all of the bids from the subcontractors until approximately 2-1/2 hours prior to bid opening on October 27, 1977. In this connection, K & S advises that in order to insure timely arrival of its bid it was mailed on October 24, 1977. Moreover, K & S informs us that in the St. Louis area there is a "four hour rule," promulgated by the Associated General Contractors, which provides that all subcontractor bids will not be submitted more than 4 hours prior to bid opening.

K & S admits that it can understand the subcontractors' apprehension in submitting their bids prior to the 4-hour limit since there are some general contractors who in fact bid shop. However, K & S contends that the subcontractor listing requirement

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forces "a general contractor to turn in a subcontractor list that possibly may not [contain] the lowest and/or the most qualified bidder inasmuch as the general contractor must do a lot of second guessing relative to selections due to the limited time element involved." Furthermore, it is K & S's opinion that once it became known that a general contractor engages in bid shopping, no subcontractor would submit a bid to that firm.

In conclusion, K & S argues that if its bid was accepted the result would be an approximate \$53,000 savings for the Government; therefore, its protest should be sustained.

With respect to K & S's contention that the IFB was unduly restrictive because it required a bid to include a list of subcontractors, the protest is untimely as this alleged impropriety was apparent on the face of the bid and should have been raised prior to bid opening. See General Accounting Office (GAO) Bid Protest Procedures 4 C.F.R. § 20.2(b)(1) (1977). Similarly, K & S's argument that paragraph 10 of the Special Conditions, supra, is ambiguous if considered with the General Conditions, Item 10 (GSA Form 1139), Subcontracts, is untimely since any alleged ambiguity would be apparent on the face of the bid and, accordingly, should have been raised prior to bid opening. See GAO Bid Protest Procedures, supra.

Concerning K & S's failure to submit the list of subcontractors, it is our view that this failure would give K & S, contrary to the terms of the IFB, the opportunity to select after bid opening the firm(s) with which it would subcontract and engage in the practice of bid shopping. "Bid shopping" is the seeking after award by a prime contractor of lower price subcontractors than those originally considered in the formulation of its bid. James and Stritzke Construction Company, 54 Comp. Gen. 159, 160 (1974), 74-2 CPD 128. The subcontractor listing requirement, 41 C.F.R. § 5B-2.202-70 (1976), is intended to preclude "bid shopping" and its attendant undesirable effects and to require of bidders an agreement not to

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have any of the listed categories of work performed by firms other than those listed and is, therefore, a material requirement pertaining to bid responsiveness. James and Stritzke Construction Company, supra; 50 Comp. Gen. 839 (1971); 43 Comp. Gen. 206 (1963). Based on the foregoing and the specific language of paragraph 10.4, supra, it is our position that K & S's bid was nonresponsive for failing to meet the subcontractor listing requirement.

Since K & S's bid, therefore, could not properly be accepted, we need not review K & S's other allegations or GSA's determination that the bid was also nonresponsive for failure to meet the affirmative action requirements.

Accordingly K & S's protest is dismissed in part and denied in part.


Deputy Comptroller General
of the United States